

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 6, 1861.—Ordered to be printed.

Mr. BIGLER made the following

REPORT.

(To accompany bill S. 541.)

The Committee on Commerce to whom was referred "bill (S. 541) in relation to the liabilities of the collectors of customs," have had the same under consideration, and report:

By section two, of an act of Congress entitled "An act making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred and thirty-nine," passed 3d of March, 1839, it was provided: "That from and after the passage of this act all money paid to any collector, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the Treasurer, kept and disposed of; and it shall not be held by said collector, or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable, in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector, or to the person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the over-payment, directing the said Treasurer to refund the same out of any money in the Treasury not otherwise appropriated."

Previous to the passage of which act, it was settled by the United States Supreme Court in the cases of *Elliott vs. Swartwout*, 10 Peters, and *Beno vs. Hoyt*, 13 Peters, 263 and 267, that a collector was liable in an action to recover back an excess of duties paid to him as collector where duties had been illegally demanded and a protest made at the time of the payment, or notice then given that the party intended to

contest the claim. After these decisions, collectors of the customs claimed the right to retain money received by them for the government as an indemnity against claims for excess of duties collected; and in many cases this retainer, with or without warrant of law, was resorted to, occasioning inconvenience, and often heavy losses to the government by the ultimate bankruptcy and defalcation of the collectors; and, to remedy this evil, the second section of the act of 1839, above referred to, was passed.

Afterwards the question as to the construction to be given to that act came before the Supreme Court of the United States, at the January term in 1845, in the case of *Cary vs. Curtis*, 3 Howard's Reports, 236. That, too, was an action to recover money paid to Curtis, as collector of the port of New York, for duties. A majority of the court held that the common law right of action against the collector was, by implication, taken away by that statute, and say, "That as the collector, since the statute, had power neither to retain nor to refund, there could, as between him and the plaintiff, arise no privity or implication, on which to found the promise raised by the law, only where an obligation to undertake or promise exists; and that, therefore, the action for money had and received could not, in this case, be maintained, but was barred by the act of Congress of 1839."

After this decision, Congress passed an act, approved the 26th of February, 1845, which says, "That nothing contained in the second section of the act of the 3d of March, 1839, shall take away, or be construed to take away or impair, the rights of any person or persons who have paid, or shall hereafter pay money, as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable in whole or in part by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right of trial by jury touching the same, according to the due course of law.

"Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth, distinctly and specifically, the grounds of objection to the payment thereof."

The fair construction of this act is that, inasmuch as the law makes it the duty of the collector to pay all moneys into the Treasury, and he is forbidden to retain any in his own hands, he should not be personally responsible for duties wrongfully exacted, especially as all duties are received by him under express instructions from the Treasury Department, and when received are, in pursuance of law, placed to the credit of the Treasurer of the United States. It has, however, been recently held by the United States circuit court for the district of New York that the collector is personally liable for said moneys, and

that an execution may issue against his private property, thereby subjecting him to a responsibility incurred in the discharge of the instructions of the department, without having any power or control over the matter. There seems to be no good reasons why a creditor of the government who becomes such by an overpayment of duties should be placed in any better condition than other creditors of the government, or why the indulgence of Congress (which gives him a right of trial by jury to ascertain and try the legality and validity of his claim, and makes it the special duty of the Secretary of the Treasury, on the amount being so ascertained, to refund the same) should be extended so as to give such creditor a right to take the property of a citizen who may or may not be officially connected with the government at the termination of such actions, many of which cannot be tried until long after the persons against whom the same are pending shall have ceased to hold their offices.

The committee therefore recommend the passage of the bill, and ask that the accompanying letter of the Secretary of the Treasury be printed as part of their report:

TREASURY DEPARTMENT,
January 28, 1861.

SIR: I have examined the "draft of a section," left by you at the department, "for a law in reference to liability of collectors for moneys received by them," and have the honor to state that the department sees no objection to its passage.

The draft is herewith returned.

I am, very respectfully,

JOHN A. DIX,
Secretary of the Treasury.

HON. WILLIAM BIGLER,
Of the Committee on Commerce, United States Senate.

